Supreme Court of the United States.

The Interstate Commerce Commission,
Appellant,

vs.

David G. Baird, Fred. P. Chambers, George O. Waterman, et al.

BRIEF ON MOTION TO DISMISS APPEAL.

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FEBRUARY 8TH, 1904.

Allen, Lane & Scott, Pr., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1903. No. 409.

The Interstate Commerce Commission, Appellant,

vs.

David G. Baird, Fred. F. Chambers, George O. Waterman, et al.

BRIEF SUR MOTION TO DISMISS ON BEHALF OF DAVID G. BAIRD, GEORGE O. WATERMAN, GEORGE F. BAER, EBEN B. THOMAS, AND W. G. BROWN, APPELLEES.

I.

The present proceeding had its inception in the Circuit Court of the United States for the Southern District of New York, through a petition filed by the Interstate Commerce Commission praying for an order to compel the production of certain documents and answers to certain questions, deemed by the Commission to be material to the issues in a certain proceeding pending before it in which William R. Hearst was complainant and certain railroad companies defendants.

The appellees herein and the respondents in the proceeding below were witnesses who had declined under instruction of counsel to produce the documents called for or to answer the questions propounded to them.

The Circuit Court dismissed the petition of the Commission upon the ground that the documents, which the Commission had directed should be produced and the ques-

tions which it had directed the witnesses to answer, were irrelevant to any issue involved in the proceeding before it. From this action of the Circuit Court this appeal was taken. The motion to dismiss is now made upon the ground that no warrant exists for an appeal direct to this court from the decree of the Circuit Court.

II.

As was well remarked by the Circuit Judge (Record, page 832):—

> "There are several witnesses proceeded against, although for convenience their cases have been heard together on a single petition. Separate orders, however, should be made in each case, for each case is a separate proceeding, instituted in this court against the particular individual."

Notwithstanding this view of the matter—which is undoubtedly correct—the final order entered in the Circuit Court (Record, page 836) took a consolidated form, as though the several individuals were joint respondents or defendants in a joint proceeding; and but a single citation issued directed to the various appellees jointly, omitting, however, the name of E. C. Hebbard, secretary of the Guaranty Trust Company of New York, who was one of the respondents below, but who was not cited here, and is not therefore a party to this appeal.

The assignments of error, however, as was necessary, deal with the several cases individually and separately.

III.

It may, we think, be safely assumed that the learned counsel for the appellant will concede that, under the legislation of Congress prior to that enacted at the last session, there existed no warrant for the appeal to this court from the order or decree of the Circuit Court.

The decisions of this court have clearly determined that the provisions of the Act to Regulate Commerce, author-

izing and directing appeals directly to the Supreme Court, have been superseded by the Act of March 3d, 1891. That Act, creating and establishing the Circuit Courts of Appeal, undoubtedly had for one of its objects the vesting in the courts thereby created of the great body of appeals from the Circuit Courts. Section V. of the Act defines the cases in which an appeal could be taken directly to this court. But clearly the present case does not come within any of the cases covered by that section, which reads as follows:—

> "SECTION 5. That appeals or writs of error may be taken from the district courts or from the existing circuits courts direct to the Supreme Court in the following cases:
>
> "In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.
>
> "From the final sentences and decrees in prize causes.
>
> "In cases of conviction of a capital or otherwise infamous crime.
>
> "In any case that involves the construction or application of the Constitution of the United States.
>
> "In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.
>
> "In any case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States.
>
> "Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases."

It is true that in some of the answers below, as, for instance, in that of Brown (Record, page 116), tentative

and argumentative suggestion was made to the effect that—

> "This respondent is further advised, and so alleges and charges that in case it shall be held that the said 'Act to Regulate Commerce' confers upon the Commission power to require by subpœna or otherwise the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents not directly and solely relating to matters under investigation pursuant to the provisions of the said Act, then the said Act is unconstitutional and void, being in direct violation of the provisions of the fourth amendment to the Constitution of the United States, and in derogation of the right of this respondent and of the corporation of which he is an officer to have its private books and private affairs as a merchant protected from unreasonable search or seizure."

But this secondary and conditional averment is not enough. The decisions of this court settle that the jurisdictional questions must inhere in the case actually and substantially, and not remotely and secondarily, and that the question upon which the appellate jurisdiction depends must have been decided by the court below, or have been necessarily involved in what was decided.

Ansbro *vs.* United States, 159 U. S., 695-697;
Cornell *vs.* Green, 163 U. S., 75-78;
Muse *vs.* Arlington Hotel Co., 168 U. S., 430-435;
Western Union Tel. Co. *vs.* Ann Arbor R. R., 178 U. S., 239-243;
Lampanas *vs.* Bell, 180 U. S., 276-282;
Carey *vs.* Houston and Tex. Cent. Ry. Co., 150 U. S., 170;
Carter *vs.* Roberts, 177 U. S., 496-500;
Defiance Water Co. *vs.* Defiance (decided this term);
Arbuckle *vs.* Blackburn (decided this term).

The question must not only be present in the case, and be a primary and real and substantial issue, but it must also be the controlling question, and not merely incidental and collateral and argumentative.

Carey *vs.* Houston and Tex. Cent. Ry., *Ub. sup.*

In this case the sole questions considered and determined by the Circuit Judge were whether the documents called for and the answers required from the witnesses were "relevant to the questions of reasonable rates, discrimination, &c., which were presented by the complainant in the prosecution," pending before the Interstate Commerce Commission. See opinion of the court (Record, page 832). No constitutional question was considered or passed upon.

The constitutional right thus asserted in some of the answers of the defendants was not relied upon nor set up by all of them.

IV.

But it seems to have been thought by the learned counsel for the appellant that the provisions of two Acts passed at the last session of Congress warrant this appeal. These Acts are those of February 11th, 1903, and February 19th, 1903. The former Act is entitled:—

> "An act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July 2d, 1890, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February 4th, 1887, or any other Acts having a like purpose that may be hereafter enacted."

The first section provides for the expeditious hearing of "*any suit in equity* pending or hereafter brought in any Circuit Court of the United States," under the Acts referred to in the title, "*wherein the United States is complainant.*"

Section 2 regulates appeals in such cases and is as follows:—

> "That in every suit in equity pending or hereafter brought in any Circuit Court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court, and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a Circuit Court to the Circuit Court of Appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law."

It will be observed that this Act deals exclusively with suits in equity, in which the United States is a complainant. The present proceeding is not a suit in equity, and the United States was not the complainant therein, and hence it is not within the purview of the Act. It is a statutory proceeding, specially provided for by the Interstate Commerce Acts, and does not present a case for the cognizance or consideration of a Court of Equity, and the complainant therein was the Interstate Commerce Commission and not the United States.

But the proposition that this proceeding is not within the purview of this Act would seem to be so clear that we should not be justified in further arguing it, and its correctness doubtless will be conceded by counsel for the appellant.

Is the appeal then warranted by the Act of February 19th, 1903? Sections 1, 2, 4, and 5 contain, it is believed, nothing pertinent to or bearing upon the question raised by this motion. This latter Act is entitled "An Act to further regulate commerce with foreign nations and among the States."

The proviso to Section 3 is doubtless relied upon by the

appellant as justifying the appeal to this court. This Section provides as follows:—

"That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the public rates on file, or is committing any discrimination forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several District Attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February 4th, 1887, entitled 'An Act to regulate com-

merce' and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding; *Provided*, That the provisions of an Act entitled 'An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July 2d, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February 4th, 1887, or any other Acts having a like purpose that may be hereafter enacted, approved February 11th, 1903,' shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission."

This section, it will be observed, authorizes a new class of proceedings against carriers in the Circuit Courts of the United States at the instance of the Interstate Commerce Commission, to be conducted by the District Attorneys of the United States under the direction of the Attorney General, provides for the compulsory attendance of witnesses, both upon the part of the carrier and shipper, and then enacts through and by means of the proviso "That the provisions of an Act" (*i. e.*, that of February 11th, 1903) "shall apply to any case prosecuted

under the direction of the Attorney General in the name of the Interstate Commerce Commission."

As the present proceeding is not within the class of cases which are authorized by the section, the first question to be determined is whether Congress intended by the proviso to extend the provisions of the Act of February 11th, 1903, to "any case," prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission, generally, and without regard to the consideration whether it was a case of the character authorized by the section of which the proviso forms a part. That it did not so intend is the contention of the appellees.

It is an accepted rule or canon of statutory construction that a proviso is presumed to have relation to the provisions of the Act or section of which it forms a part. A good illustration of this rule is furnished by the decision of this court in the case of Minis *vs.* United States, 15 Peters, page 423. In that case, this court was obliged to construe a proviso to an Act making certain appropriations in the year 1835 for certain harbors and for removing obstructions in certain rivers. The Act contained this proviso: "*Provided* that no officer of the army shall receive any per cent. or additional pay, extra allowance or compensation, in any form whatsoever, on account of disbursing any public money appropriated by law, during the present session, for fortifications, execution of surveys, works of internal improvement, building of arsenals, purchase of public supplies of any description, or for any other service or duty whatsoever, unless authorized by law."

It became necessary to determine whether the last portion of the proviso was a general provision, applicable to the future, and this court dealt with this proposition in the manner indicated by the following extract from the opinion of Mr. Justice Story:—

> "The argument on behalf of the United States is that this proviso, although found in a mere appropriation law of limited nature, is to be construed, by

reason of the words 'or for any other service or duty whatsoever, unless authorized by law,' to be permanent in its operation, and applicable to all future appropriations, where officers of the army are employed in such service or duty; and that it appears from the record that this was the very ground on which the Treasury Department rejected the claim of Dr. Minis for commissions. * * * We are of the opinion that such is not the true interpretation of the terms of the proviso, and that it is limited exclusively to appropriations made at the session of 1835.

"It would be somewhat unusual to find engrafted upon an Act making special and temporary appropriation any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation. The office of a proviso, generally, is either to exempt something from the enacting clause or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to cases not intended by the legislature to be brought within its purview. A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment."

Applying the principle adopted by this court in the case just referred to to the present one requires, we submit, that the words "any case" should be construed as any case of the class mentioned in the section, and such limitation would be only in consonance with well-settled rules of statutory construction.

The qualifying words used in the proviso in connection with and as further defining or limiting the words "any case" also substantiate this view. It results from these that the cases covered by the proviso are only those prosecuted under the direction of the Attorney General

in the name of the Interstate Commerce Commission. It is precisely this class of cases that Section 3 of the Act we are considering deals with, and this class alone.

These qualifying or limiting words are also important in another aspect of the case. If the words "any case" as used in the proviso are to be given such a wide and general signification as to bring within their scope any proceedings of whatever character under the Interstate Commerce Acts, only provided they are instituted by the Interstate Commerce Commission and are under the direction of the Attorney General, we would have this curious result. There are a certain class of cases, of which the present is one, in which the proceedings may or may not be conducted under the direction of the Attorney General, this being a matter for the decision of the Interstate Commerce Commission. It would result from this, therefore, that the question as to the court to which an appeal would lie from the Circuit Court would be determinable, not with reference to the character of the proceeding or the issues involved therein, but with reference solely to the personnel of the counsel conducting the proceeding. Thus in the present case the appeal would lie to the Supreme Court, because the proceeding is under the direction of the Attorney General, whereas if the Commission had chosen to have the proceeding conducted by its own counsel or by the counsel for the complainant in the proceeding before it, the appeal would lie to the Circuit Court of Appeals. Certainly this court should be loath to adopt a construction of this proviso which would bring about such a result.

But there is also a strong argument in support of the contention of the appellees, based upon the consideration that the provisions of the Act of February 11th, 1903, which this proviso extends to cases which it was dealing with are of such a character as to make it clear, we submit, that Congress had in mind, when it used in the proviso the words "any case," the limited class of cases which we contend for, or, at the furthest, cases of a similar character to those dealt with in the Act whose provisions were thus extended.

Undoubtedly the Act of February 11th, 1903, deals exclusively with suits in equity, and we submit that by making applicable its provisions (dealing as they do exclusively with the procedure to be followed in the certain class of "suits in equity" therein mentioned) to "any case prosecuted," &c., Congress intended to enact thereby merely that such procedure should be extended to suits in equity "prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission," the Act of February 11th, 1903, applying by its terms only to suits in equity, wherein the United States was complainant. Whether these should be suits in equity generally or merely the particular class of equitable proceedings authorized by the Act containing this proviso need not be determined for the purposes of this motion.

The procedure provided for in the Act of February 11th, 1903, is, if not inapplicable, at least but illy adapted to any other than equity proceedings. In fact, as to actions at law, the Act is wholly inapplicable, since it provides for a hearing by judges and makes no provision for a jury.

If we are to treat the proviso as intended to extend the provisions of the Act of February 11th, 1903, to other cases than those embraced within the provisions of the Act of February 19th, 1903, then its purpose could have been as well, and, indeed, better accomplished by an amendment to the Act of February 11th, for this is what, in effect, under such a construction it amounts to. What, then, would have been its construction had the proviso been enacted as an amendment to the Act of February 11th, and would any significance have been given the word "case" instead of "suit in equity," with which character of cases alone the Act of February 11th itself deals?

The amendment, if we paraphrase the language of the proviso, would then have been in this form: "The provisions of the Act entitled, &c., shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission."

Could any one have fairly contended that the word "case" in this connection meant anything else than "suit in equity?"

In the Act of February 11th, 1903, the word "case" is used a number of times as synonymous with "suit." Thus if the Attorney General shall certify that the "case is of general public importance," this shall be made known to the judges of the Circuit Court "in which the case is pending. Thereupon such case shall be given precedence." And then it is provided that if the "judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court." And so on in several other instances.

It is clear, therefore, from the context itself of this Act of February 11th, 1903, that Congress used the words "case" and "suits" interchangeably as signifying the same thing.

It is apparent that the purpose of the Act of February 11th, 1903, was to provide a system under which cases of moment or of public importance—suits in equity in which the United States was complainant—could be dealt with expeditiously. Had the proviso, which we are considering, any other purpose than the extension or application of this system to cases of a like character instituted by the Interstate Commerce Commission?

The proceedings upon behalf of the Commission, which the Act of February 19th, 1903, specially authorizes, would presumably be of this character; proceedings to enjoin some violation of the Interstate Commerce Acts, which would undoubtedly only be brought when the interests of the public or a large portion thereof were involved. A reason, therefore, existed for extending to such cases the same expeditious hearing that would have been accorded to them had the United States been the complainant therein. But it was never intended, we submit, that if, in a proceeding pending before the Commission, in which some shipper was complaining of a rate charged him as too great or as discriminative, a question should arise as to the relevancy of certain testimony which rendered it necessary that re-

sort should be had, as in the present case, to the Circuit Court of the United States, such a proceeding should be accorded the expeditious consideration provided for by the Acts in question.

For the reasons given, therefore, we respectfully submit that the motion to dismiss should prevail.

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